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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LENOX HILL HOSPITAL,
A NEW YORK NOT-FOR-PROFIT CORPORATION,

Petitioner,

—v.—

AMIR MANOCHERIAN, ROSITA MANOCHERIAN, ALAN MANOCHERIAN, ROBERT MANOCHERIAN, AND BARBARA MANOCHERIAN, D/B/A FAME COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondents' opposition sets forth three arguments to the petition for a writ of certiorari in this case: 1) the New York State Court of Appeals decision is not final within the meaning of 28 U.S.C. § 1257(a) (1994); 2) the Court of Appeals applied the proper standards below; and 3) the Court of Appeals did consider and implicitly reject the argument of petitioner Lenox Hill Hospital ("Lenox Hill" or "the Hospital") that 1984 N.Y. Laws 940 ("Chapter 940") affords the respondents just compensation. Respondents' interpretation of the Court of Appeals' opinion is untenable and contrary to applicable law. For these reasons, and for the reasons stated in the petition, none of those arguments has merit, and a writ of certiorari should be granted.

I.

THE UNITED STATES SUPREME COURT HAS JURISDICTION TO REVIEW THIS CASE UNDER 28 U.S.C. § 1257(a)

The New York State Court of Appeals decision grants judges, in the name of the Constitution, far more power to strike down economic regulation that does not effect a physical taking than

any that has been recognized in recent decades. This Court has jurisdiction to hear this appeal and to grant a writ because New York's highest court has struck down a state statute on federal constitutional grounds, and its decision — if left standing — will cause immediate damage to the ability of legislatures to enact and have implemented legislation of general applicability. This Court has repeatedly held that it has jurisdiction in those circumstances, so that, if the construction of federal law relied on by the state courts to strike down state legislation is improvident, this Court can so hold and "disabuse" state courts of any "erroneous view" of federal law that has led to the invalidation of duly enacted legislation.

Respondents assert that the petition should be denied as the Court of Appeals' decision was not final within the meaning of 28 U.S.C. § 1257(a). Conceding that the first three elements of the fourth exception noted in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975), are satisfied,[1] respondents contend that the fourth element is not, which provides for functional finality where "a refusal immediately to review the state-court decision might seriously erode federal policy . . . ." 420 U.S. at 482-83. Respondents' argument that no federal policy within the meaning of *Cox* is at stake is clearly wrong.

This Court has repeatedly, and properly, found a compelling federal policy of ensuring that judicial invalidation of state statutes on federal grounds be exercised no more broadly than federal law properly construed authorizes. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (strong policies support review of state court judgments when it appears that "the state

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[1] To use the phrasing of *Cox*, "[1] the federal issue has been finally decided in the state courts [2] with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds . . . and [3] where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of . . . the state proceedings . . . ."

court decided the case the way it did because it believed that federal law required it to do so"); *Arizona v. Evans*, ___ U.S. ___, 115 S. Ct. 1185, 1189 (1995) (a state's freedom is enhanced when the Supreme Court exercises jurisdiction to "disabuse [ ] [a state court] of its erroneous view of what the United States Constitution requires"). Accordingly, this Court has repeatedly construed § 1257(a)'s finality requirement to decide important federal questions concerning the interpretation of the Constitution. *See, e.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989) ("Adjudicating the proper scope of First Amendment protections has often been recognized by this court as a 'federal policy' that merits application of an exception to the general finality rule"); *Cox*, 420 U.S. at 485-86 (reviewing the invalidation of a state statute, despite the non-finality of the state decision, as it implicated important First Amendment interests); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 (1974) ("it would be intolerable to leave unanswered . . . an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the challenged state statute] could only further harm the operation of a free press"). This appeal implicates similarly important constitutional issues.[2]

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[2] Respondents' reliance on *Flynt v. Ohio*, 451 U.S. 619 (1981), is misplaced. *Flynt* did not involve the constitutionality of a statute of general application, but rather whether, on the facts of this particular case, state officials had engaged in "selective and discriminatory" prosecution. Given the fact-intensive nature of the review sought, there was little question that immediate review would have little impact beyond the two individual defendants in the case, and therefore no broad federal policies were immediately implicated. In contrast, the Court of Appeals' decision has far-ranging implications for any legislature contemplating enactment of regulations that may implicate property interests, and arms state courts with a greater power to invalidate state legislation on Takings grounds than they have previously enjoyed.

At issue in this case is the whether the close causal nexus test, first expressed in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and further developed with the burden-shifting rough proportionality standard enunciated in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309 (1994), should be applied outside the site-specific administrative context and used by the judiciary to invalidate duly enacted legislation of general application. This is clearly an important federal question which will have a broad impact on future interpretations of the Takings Clause of the Fifth and Fourteenth Amendments to the Constitution, as well as on the ability of legislatures to enact legislation without having to make express legislative findings justifying their enactments, and to have that legislation implemented without being invalidated under the demanding and in this context inappropriate *Dolan* standards.[3]

II.

THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS IMPROPERLY IMPOSED AN AFFIRMATIVE BURDEN ON THE LEGISLATURE TO JUSTIFY DULY ENACTED LEGISLATION

Respondents claim that the Court of Appeals properly applied the "close causal nexus" standard by imposing upon the legislature an affirmative burden of justifying duly enacted regulations, and by, in the words of dissenting Judge Levine, "pick[ing] and choos[ing] among the express purposes of legislation in employing the test of whether the requisite

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[3] Respondents' attempts to categorize this case as "a unique state law determination," Resp. Br. pp. 15-16, ignores the fact that the Court of Appeals decision (1) clearly imposes upon legislatures an affirmative burden to justify legislation affecting property interests and (2) clearly provides that economic regulatory legislation may be struck down unless it passes muster under *Dolan*. Contrary to respondents' contentions, this case does not require complicated interpretations of New York's Rent Stabilization scheme, but rather the application of developing and general principles of the Takings Clause.

connection exists between the particular regulation and the problems the Legislature sought to ameliorate." Pet. App. 25a.

Respondents' argument seems to based in a fundamental confusion as to the test to be applied in takings challenges to statutes of general application. They erroneously equate the "substantially advance legitimate state interests" analysis set forth in *Agins v. Tiburon*, 447 U.S. 255 (1980) and *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), with the "close causal nexus" and "rough proportionality" standards set forth in *Nollan* and *Dolan*. The test of *Agins* and *Penn Central* applies to all legislation challenged under the Takings Clause, from legislative enactments like Chapter 940 to the conditional granting of development permits at issue in *Nollan* and *Dolan*.

By contrast, Judge Levine contended in dissent and we believe that *Dolan*'s close causal nexus and rough proportionality standards apply only to takings challenges of the conditional grant of development permits. Regardless of whether the "rough proportionality" standard of *Dolan* was drawn in part from state court decisions invalidating statutes of general applicability, this Court in *Dolan* made clear that, as a constitutional standard, the "rough proportionality" test was not to be applied so broadly. The Court in *Dolan* expressly distinguished between "essentially legislative determinations classifying entire areas of the city" and "adjudicative decision[s] to condition petitioner's application for a building permit on an individual parcel," *Dolan*, 114 S. Ct. at 2316, and imposed the rough proportionality test to the latter cases only. As Chapter 940 plainly falls in the former line of cases, the Court of Appeals' application of *Nollan* and *Dolan* was improper. Applying *Dolan* to regulatory statutes that do not result in physical takings renders it indistinguishable from the "discredited, pre-Depression version of substantive due process." *United States v. Lopez*, No. 93-1260, 1995 U.S. LEXIS 3039, *94 (Apr. 26, 1995) (Stevens, J., dissenting).

It is not surprising that respondents may be confused by the application of these two separate standards; many courts have confused the scope of these tests as well. In addition to those

cases cited in the petition, Pet. 17, two cases decided just this month (and after the petition had been filed) continue to muddle the *Nollan* and *Dolan* standards. In *Sarasota County v. Taylor Woodrow Homes Ltd.*, No. 94-01381 1995 Fla. App. LEXIS 3571 at *11-12 (Fla. Dist. Ct. App. Apr. 7, 1995) (citations omitted), the court clearly understood that *Dolan* only applies to the imposition of conditions on a permit:

> We recognize the recent line of cases holding that the government cannot compel a person to give up a constitutional right to property in exchange for a discretionary benefit where the property sought has little relationship to the benefit. *[See Dolan v. City of Tigard; Nollan v. California Coastal Comm'n.]* Likewise we understand that a county cannot condition the issuance of a permit upon a specific condition without establishing an essential nexus between that condition and a legitimate state interest. *Dolan*. In addition to this essential nexus, a county that conditions a permit upon a dedication of private property is now required to make an individualized determination that there exists a "rough proportionality" between the dedication and the nature and extent of the impact of the proposed development. *[Dolan]*; *see Lee County v. New Testament Baptist Church of Fort Myers, Fla., Inc.*, 507 So. 2d 626 (Fla. 2d DCA), *review denied*, 515 So. 2d 230 (Fla. 1987).

However, in *Templeton Coal Co. v. Shalala*, TH 93-158-C-T/H, 1995 U.S. Dist. LEXIS 4419 at *67 n.12 (S.D. Ind. Apr. 4, 1995), the district court asserted that the nexus test of *Dolan* might apply to a takings challenge to a federal statute (although it proceeded to hold that the legislation passed this test). Clearly, confusion amongst both practitioners and the courts as to when

and whether the *Dolan* and *Nollan* standards should apply continues to build.[4]

III.

THE COURT OF APPEALS DID NOT ADDRESS WHETHER CHAPTER 940 AFFORDED JUST COMPENSATION

Contrary to respondent's say-so, it could not be plainer that the Court of Appeals never addressed whether Chapter 940 afforded the respondents just compensation for the alleged taking. Rather, the Court found Chapter 940 to be an unconstitutional taking and *per se* impermissible:

> The sharply focused legal question under the controlling precedential and analytical principles may be reduced simply to whether the legislation is supported by a substantial State interest and close nexus. No amount of extensive and virtually exclusive exploration of economic recalibration of the test, as an expectation for the future, can change that

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[4] *Yee v. City of Escondido*, 503 U.S. 519 (1992), heavily relied on by Respondents, does not clarify the issue. In *Yee*, this Court, after determining that the challenged rent control ordinance did not constitute a physical taking, remanded the case to determine whether a regulatory taking had occurred. In dicta, this Court indicated that there would have to be a determination of whether a "sufficient nexus" existed between the statutory purpose and its application. *Id.* at 519. The Court never indicated that this nexus must be a "close causal nexus." It merely indicated that the petitioners had appropriately claimed that the statute did "not '"substantially advance"' a '"legitimate state interest."'" *Id.* (citations omitted). Had the Court of Appeals applied that standard in this case, it would have found, as did the Appellate Division and State Supreme Court, that Chapter 940 advances the legitimate purposes of New York's Rent Stabilization scheme sufficiently to withstand challenge as a regulatory taking, or as a deprivation of property without due process of law.

> central controlling feature under reasonably clear precedents and principles. . . . The Constitution forbids State action by fiat, no matter what the economic equation.

Pet. App. at 16a. Not one word in the Court of Appeals' opinion examines whether the additional 15% rent increases granted by Chapter 940 afforded the respondents just compensation so as to preclude a finding that the Takings Clause was violated (which requires, as this Court has repeatedly said, not only a "taking" but one "without just compensation"). To the contrary, the decision plainly invalidates the statute as an unconstitutional taking outright, regardless of the benefits offered the Manocherians by the extra rent increases, finding it not closely-enough tailored to the purposes of the original rent stabilization laws. Having invalidated the statute outright, the Court of Appeals could not and did not remand the case for a determination of the compensation issue.[5] This issue would independently justify granting a writ of certiorari.

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[5] The Court of Claims action subsequently filed by the Manocherians has no relevance to Lenox Hill's rights under the now-invalidated statute (which have been finally determined and conclusively lost, unless this Court reverses) or to the case at hand. At issue in the Court of Claims action is not whether Chapter 940 afforded the Manocherians enough compensation so as to render that statute constitutional and leave Lenox Hill with its rent stabilized leases (a judgment the Court of Claims is not free to reach), but rather only the compensation they may obtain from the state for the occupation that occurred before the Court of Appeals declared Chapter 940 unconstitutional in this case.

CONCLUSION

For these reasons, and the reasons set forth in the petition the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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